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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

HENRY WILLIS, III,

Cross-Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

DID THE DISTRICT ATTORNEY'S EXCLUSION OF ALL BLACK PERSONS FROM THE JURY BY USE OF HIS PEREMPTORY STRIKES, TOGETHER WITH OTHER STATE ACTION ALLOWING HIM TO ACHIEVE THIS RESULT, DEPRIVE HENRY WILLIS OF HIS RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, THE PRIVILEGES AND IMMUNITIES OF A UNITED STATES CITIZEN, AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1979) 27

Avery v. Georgia, 345 U.S. 559 (1953) 14

Ballard v. United States, 329 U.S. 187 (1946) 9

Berger v. United States, 295 U.S. 78 (1934) 11

Brown v. Board of Education, 369 U.S. 294 (1954) 20

Carter v. Jury Commission, 396 U.S. 320 (1970) 21

Commonwealth v. Allen, 400 N.E.2d 229 (Mass. App. 1980) 29

Commonwealth v. Futch, 492 Pa. 359, 424 A.2d 1231 (1981) 30

Commonwealth v. Reid, 424 N.E.2d 495 (Mass. App. 1981) 10,29

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (1979) 10,28,29,30

Duncan v. Louisiana, 391 U.S. 145 (1968) 21

Erie R.R. v. Tompkins, 302 U.S. 671 (1938) 20

Ex parte Virginia, 100 U.S. 339 (1880) 9,11

Furman v. Georgia, 408 U.S. 288 (1972) 22

Gardner v. Florida, 430 U.S. 349 (1977) 22

Gilliard v. Mississippi, ___ U.S. ___ 78 L.Ed. 2d 179 (1983) 26

Gregg v. Georgia, 428 U.S. 153 (1976) 24

Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972) . . 14

Jones v. Georgia, 389 U.S. 24 (1967) 16

Lockett v. Ohio, 438 U.S. 586 (1978) 22,24

Loving v. Virginia, 388 U.S. 1 (1967) 9

Mallot v. State, 608 P.2d 737 (Alaska 1980) 30

McCray v. New York, ___ U.S. ___, 103 S.Ct. 2438 (1983) 10,29

People v. Fuller, 136 Cal. App.3d 403, 186 Cal. Rptr. 283 (1982) 29

People v. Rousseau, 129 Cal. App.3d 526, 170 Cal. Rptr. 892 (1982) 10,29

People v. Wheeler, 22 Cal.2d 258, 583 P.2d 748 (Cal. 1978) 10,28,29,30

Peters v. Kiff, 407 U.S. 493 (1972) 18

Regents v. Bakke, 438 U.S. 265 (1978) 20,27

Ridley v. Texas, 475 S.W.2d 769 (Tex. Crim. App. 1972). 25

Rose v. Mitchell, 443 U.S. 545 (1979) 8,9

Sims v. Georgia, 389 U.S. 404 (1962) 16

State v. Brown, 371 So.2d 751 (La. 1979) 28

State v. Crespin, 94 N.H. 486, 612 P.2d 716 (1980) . . . 10,28

State v. Eaves, 365 So.2d 1361 (La. 1978) 29

Strauder v. West Virginia, 100 U.S. 303 (1880) 8,9,18, 19,24,27

Swain v. Alabama, 380 U.S. 202 (165) 1,6,9,11,13 14,15,18,19 21,28,29

Taylor v. Louisiana, 419 U.S. 522 (1975) 21

United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971) 13

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 27

Washington v. Davis, 426 U.S. 229 (1979) 27

Watkins v. State, 199 Ga. 81, 33 S.E.2d 324 (1945) 14

Whitus v. Georgia, 389 U.S. 545 (1967) 9,15,16

Willis v. Balkcom, ___ U.S. ___, 68 L.Ed.2d 305 (1981) 3

Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert denied, 444 U.S. 585 (1979) 3

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 1,2

Woodson v. North Carolina, 428 U.S. 280 (1976) 23

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 9,11

FEDERAL STATUTORY PROVISIONS

18 U.S.C. §243 13

28 U.S.C. §2254 (1) 2

STATE STATUTORY PROVISIONS

Ga. Code Ann. §26-3102 [OCGA §17-10-31] 2

Ga. Code Ann. §59-801 [OCGA §15-12-160] 2,7

Ga. Code Ann. §59-805 [OCGA §15-12-165] 2,7

Ga. Code Ann. §59-808 [OCGA §15-12-166] 2,7

CONSTITUTIONAL AMENDMENTS

Sixth Amendment 1,2,21

Eighth Amendment 1,2

Fourteenth Amendment 1,2,13,21,27

OTHER AUTHORITIES

4 Blackstone, Commentaries 19

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

HENRY WILLIS, III, *

Cross-Petitioner, *

*

v. *

*

WALTER D. ZANT, Warden, *
Georgia Diagnostic and
Classification Center, *

Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Cross-Petitioner, Henry Willis, III, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals which remanded his case for hearing on the prosecutor's use of peremptory challenges under the standard of Swain v. Alabama, 380 U.S. 202 (1965), but not under the standards that should be provided by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. The judgment was entered on November 17, 1983, and rehearing en banc denied on December 22, 1983.

CITATION TO OPINION BELOW

The Eleventh Circuit Court of Appeals rendered its opinion on November 17, 1983. A copy of the Eleventh Circuit opinion is included in Appendix C of Cross-Respondent's Appendix to his Petition for a Writ of Certiorari, Case No. 83-1558; and is reported as Willis v. Zant, 720 F.2d 1212 (1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 17, 1983. See Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). A timely suggestion for rehearing en banc was filed by the State, but denied by the court on December 22, 1983. The State then timely filed a petition for a writ of certiorari on March 19, 1984. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of this Court; the State's Petition for Writ of Certiorari, No. 83-1558, was received by counsel for Cross-Petitioner on March 20, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This case also involves the following provisions of the Code of Georgia which are set out in Appendix A: Ga. Code Ann. §26-3102 [OCGA §17-10-31]; Ga. Code Ann. §59-805 [OCGA §15-12-165]; Ga. Code Ann. §59-808 [OCGA §15-12-166]; Ga. Code Ann. §59-801 [OCGA §15-12-160].

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Each of the constitutional issues in the Question Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE [1]

(i) Procedural History

Henry Willis was convicted of murder and sentenced to death by the Superior Court of Bleckley County in Cochran, Georgia on January 28, 1978. The Supreme Court of Georgia affirmed the conviction and sentence. Willis v. State, 243 Ga. 185, 253 S.E. 2d 70, cert. denied, 444 U.S. 885 (1979).

On January 10, 1980, Henry Willis filed a Petition for Writ of Habeas Corpus in the Superior Court of Tattnall County, Georgia. The Petition was subsequently amended. The Petition was denied on August 29, 1980 (Ex. 40). A certificate of probable cause to appeal was denied by the Supreme Court of Georgia on November 13, 1980. Certiorari was denied by the United States Supreme Court. Willis v. Balkcom, 451 U.S. 926, rehearing denied, 452 U.S. 932 (1981).

On July 24, 1981, Henry Willis filed a Petition for Writ of Habeas Corpus in the District Court below (R-11); this Petition was subsequently amended (R-58). The case was referred to a United States Magistrate to submit proposed findings of fact and recommendations for disposition (R-5).

On April 29, 1982, the Magistrate issued his Proposed Findings of Fact and Conclusions of Law (R-177). (State's Appendix A). After objections were made by Henry Willis to the proposed findings and conclusions of the Magistrate, the District Court, on September 21, 1982, issued a one paragraph order

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1. References to the Record in the District Court below will be designated "R" followed by the appropriate page number. The transcript and record of the proceedings in the state courts of Georgia are contained in the forty-four Exhibits filed by the State with its Answer-Response in the District Court. The Exhibits are listed at R-62. References to the state court proceedings will be designated "Ex." followed by the appropriate Exhibit number and page number.

adopting in full the Magistrate's proposed findings and conclusions and denying habeas corpus relief (R-298). (State's Appendix B).

Henry Willis appealed the denial of habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. On November 17, 1983, that Court entered its judgment directing the district court to conduct an evidentiary hearing on two separate issues. (State's Appendix C). On December 22, 1983, the Court of Appeals denied the State's suggestion for rehearing en banc. (State's Appendix D). The State filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (No. 83-1558), and now Henry Willis files this cross-petition.

(ii) Statement of Facts

Henry Willis, III, a young black man, was charged with the February 11, 1976 murder of a white police officer in a small south Georgia town. Henry Willis and another young man, Larry Fleming, had robbed a convenience store while Son Fleming, the uncle of Larry Fleming and twenty-five years Henry Willis' senior, waited outside in a car he had borrowed for this purpose. In flight from the robbery, the three men were stopped by a police officer, whom they overpowered, taking his .357 Magnum. They ordered him into their car and drove him several miles, before Son Fleming, the older participant, ordered him out of the car and shot him in the head with the .357 Magnum. After this shooting, Henry Willis and Larry Fleming fired several shots of .22 caliber ratshot into the victim.

The central issue for the jury to decide was the punishment to be meted out to Henry Willis.

Venue in the case was originally in Lanier County, Georgia; however, a change of venue was ordered by the trial judge. The trial judge ordered counsel for the prosecution and counsel for the defense to each submit a list of ten (10) counties to

consider for the venue change. None of the ten counties on the prosecution and defense lists coincided. The trial judge ordered venue changed to Bleckley County, the first county named on the prosecution's list of ten counties. Bleckley County is a small rural south central Georgia county with a black population of only 19%.

At trial, the prosecutor used all ten (10) of his peremptory challenges on the ten (10) black venirepersons presented as prospective jurors. The prosecutor used his one (1) alternate juror peremptory challenge to strike the one black person presented as a prospective alternate juror. The focus of the prosecution's voir dire examination of black jurors was to have them struck for cause because of their views on capital punishment. He was successful in eliminating seventeen (17) black jurors for cause. With the jury thus purged of black persons, Henry Willis was convicted and sentenced to death by an all white jury with all white alternates.

The further facts necessary to Henry Willis' claim are incorporated into the argument of the claim.

REASON FOR GRANTING THE WRIT

1. General

Henry Willis, a black man, has been tried for his life by a jury from which members of his race were excluded, through the purposive actions of a public official, acting, both in fact and in strictest formality, for the State of Georgia. This jury found him guilty as charged; in the separate penalty phase, this jury, on which no member of his race had been allowed to sit, resolved against him those intangible and sensitive issues of character and record that administration of the death penalty now requires be weighed, and sent him to his death.

Henry Willis, pre-trial, moved the trial court that the prosecutor be restricted "from using his peremptory strikes in a racially biased manner" (Ex. 1 at p. 75-76). The motion distinctly alleged that the prosecutor in this case had "over a long period of time excluded" black jurors "by a long pattern of racial discrimination in the excess [sic for exercise] of his peremptory strikes" (Ex. 1 at p. 75-76). The prosecutor "demurred" to the motion (Ex. 1 at p. 767) which operated to admit the allegations supporting the motion, for the purposes of the demurrer.

At the hearing on the motion, Henry Willis offered to present evidence on behalf of the motion (Ex. 11 at p. 2546). The trial court sustained the State's demurrer to the motion as a matter of law "even assuming the facts to be true as stated in the motion" (Ex. 11 at p. 2546; Ex. 3 at p. 800).

Henry Willis has never in any court been allowed an evidentiary hearing to prove his allegation that this prosecutor has a history and pattern of exercising his peremptory strikes to systematically eliminate black persons from trial juries. The Eleventh Circuit recognized this right under Swain; however, Henry Willis is entitled to more, and therefore now petitions for these rights.

In selecting the jury to try this case, 449 jurors were summoned, and after excusal for various reasons, there was complete voir dire of 129 jurors (98 white and 31 black). Of these 129, twenty were excused because of their attitudes against the death penalty (3 white and 17 black)[2], forty-eight were

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2. The prosecution questioned black jurors differently than he did white jurors; the fact that the prosecutor did not want black people on the jury was obvious during the voir dire examination.

excused for prejudice, and four for other reasons, leaving fifty-six jurors the court considered competent.[3]

Under Georgia's "struck jury" system, (former) Ga. Code Ann. §§59-805 and 808, competent jurors were presented, in the order of their original summonses, to the prosecutor, who may accept or peremptorily reject them. If a juror is accepted by the prosecutor, he is then presented to the accused, who has the option of excusing the juror. The prosecutor may exercise a maximum of ten, and the defense, twenty, such strikes. Two alternate jurors were similarly chosen, with the prosecutor allowed one, and the defendant, two, strikes for each alternate.

Following this procedure, the jury here was chosen from among the first 42 jurors determined competent by the court, pursuant to (former) Ga. Code Ann. §59-801. Of these, 32 were white, and 10 were black.

As predicted by Henry Willis' pre-trial motion and defense counsel's statement to the court, the prosecutor used all ten of his peremptory strikes to eliminate black persons, thereby leaving Henry Willis only white jurors to consider. In selecting alternate jurors, the prosecutor used one peremptory strike against the only black person presented for consideration, securing the result of an all-white jury with all white alternates.[4] This state official, the prosecutor, successfully

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3. The general figures in this paragraph and in any subsequent paragraph are supported by the transcript of the voir dire portion of the trial, and by the brief of the Attorney General of Georgia in the Georgia Supreme Court. The breakdowns into blacks and whites are based on references in the voir dire transcript, voter registration records made part of the record and on written questionaires submitted by prospective jurors, and made part of the record. (Ex. 21 and Ex. 34).

4. The race of the 10 jurors and one alternate peremptorily struck by the prosecutor is fully documented in the record:
1) Belinda Marshall is a black woman (Ex. 21 at p. 166);
2) Robert Lee Lindsey is a black man (Ex. 21 at p. 155);
3) Montine Durham is a black woman (Ex. 21 at p. 161);
4) Ulysses Donaldson is a black man (Ex. 21 at p. 161);
5) Maggie McClendon is a black woman (Ex. 21 at p. 166);
[Footnote continues on next page]

resisted in the trial court a motion that he be forbidden from exercising his peremptory challenges "in a racially biased manner." Though it should be enough that the purposive and wholly successful actions of a state official, thus judicially immunized, in this one case plainly and grossly denied Henry Willis' right to be immune from racially discriminatory administration of law, this record further shows that Henry Willis in the same motion alleged and made an offer to prove that past actions on the part of this very official had exhibited a pattern of aiming at, and procuring, all-white juries to deal out punishment to black defendants. Even the offer was refused by the trial court. (Ex. 11 at p. 2546).

For over a century, this Court has struggled to banish race discrimination from the halls of American justice. See Strauder v. West Virginia, 100 U.S. 303 (1880). Despite this valiant struggle, racial discrimination continues to infect our judicial system. As this Court recognized in Rose v. Mitchell, 443 U.S. 545, 558-59 (1979):

> We also cannot deny that, 114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

[Footnote 4, continued]
6) Linda Ates is a black woman (Ex. 21 at p. 158);
7) Rosetta Hobes is a black woman (Ex. 21 at p. 164);
8) Willie Ates is a black man (Ex. 21 at p. 158);
9) Winnie Carswell is a black woman (Ex. 21 at p. 157);
10) Martha Ridley is a black woman (Ex. 21 at p. 168);
11) R. B. Bullard is a black man (Ex. 21 at p. 159).

Furthermore, in response to Henry Willis' objection, the trial judge noted that the prosecutor had used all of his peremptory strikes on black persons and that Henry Willis had used his peremptory strikes on white persons [of course, since after the prosecutor's exercise of his strikes, only white jurors were left for Henry Willis to consider.] (Ex. 35 at pp. 3-5).

In 1965, in Swain v. Alabama, 380 U.S. 202 (1965), this Court stamped its imprimatur on the overt practice of race discrimination in the area of jury selection. In specific terms, the Court licensed the use of peremptory challenges to strike black persons from a jury panel solely on the basis of race. This grant of approval contradicts the governing principles of the Sixth, Eighth and Fourteenth Amendments.

Under the Fourteenth Amendment, every defendant is entitled to the equal protection of the laws. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Swain violates this entitlement. Indeed, by permitting state prosecutors to engage in invidious racial discrimination, Swain defies the "central purpose" of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 10 (1967). Moreover, Swain repudiates the essential teaching of Strauder v. West Virginia, 100 U.S. 303 (1880) and Ex parte Virginia, 100 U.S. 339 (1880), namely, that black persons as well as white persons are equally entitled to the enjoyment and protection of all civil rights.

Swain also is inconsistent with the jurisprudence generated by Strauder and its progeny. See, e.g., Whitus v. Georgia, 385 U.S. 545 (1967); Alexander v. Louisiana, 405 U.S. 625 (1972). This jurisprudence is founded on the basic premise that black persons are entitled to participate as jurors in the "administration of justice". Alexander, 405 U.S. at 628-29. Accordingly, state officials may not deliberately or systematically exclude black persons from jury service. Swain, however, permits both the deliberate and the systematic exclusion of black persons from jury service. In fact, Swain allows prosecutors to abuse the jury selection process with impunity. Judicial tolerance of such flagrant abuse not only distorts the "appearance" of justice, but also compromises the "integrity" of the legal system. Rose v. Mitchell, 443 U.S. at 555-56; see also, Ballard v. United States 329 U.S. 187, 193-95 (1946).

For these reasons, several leading state courts have declined to follow the rule set out in Swain. See People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980). In place of the Swain standard, these courts have adopted an alternative procedure for identifying the existence of race discrimination, systematic or otherwise, in jury selection. This procedure has been greeted with considerable success. See, e.g., People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982); Commonwealth v. Reid, 424 N.E.2d 495 (Mass. App. 1981).

In light of this success, three Justices of this Court invited additional states to serve as "laboratories" in which the soundness and fairness of the Swain rule would receive "further study". McCray v. New York, ___ U.S. ___, 103 S.Ct. 2438, 2439 (1983). The concurring opinion in McCray reasoned that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." Id. at 2438.

Henry Willis' case squarely presents this issue in an appropriate context for resolution by this Court. Of the forty-two prospective jurors deemed competent by the trial court, only ten were black. The prosecutor used all ten of his peremptory challenges to strike black persons from the jury. Similarly, in selecting alternate jurors, the prosecutor used a peremptory challenge to strike the only black person presented for consideration, thereby securing the result of an all-white jury with all-white alternates. He used eleven strikes, all against black people.

2. Swain v. Alabama, 380 U.S. 202 (1965), was wrongly decided, and ought now to be overruled.

Swain v. Alabama was wrong in theory. It failed to take due account of the fact that the prosecutor is not just somebody's lawyer, but a state official, quite as much as is a judge or a jury commissioner -- an official charged not only with the duty to use all legitimate means toward conviction, but also with the duty to see that justice and fairness prevail. Berger v. United States, 295 U.S. 78, 88 (1935). The Swain Court, moreover, gave insufficient force to the elementary principle that a power's being generally discretionary does not imply that it may lawfully be used purposively to effect racial discrimination. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The indicted judge in Ex parte Virginia, 100 U.S. 339 (1880), was in effect given general power to select jurypersons, a power that was generally quite as discretionary as the prosecutor's discretion in the exercise of his peremptory challenges under the present Georgia statute. In that familiar and justly venerated holding and opinion, the Court had no trouble in finding that the judge's actions were forbidden by a law enacted pursuant to the Fourteenth Amendment. Yet to lodge, in a possibly neutral judge, a discretion defined as containing unquestionable power to eliminate black jurors peremptorily, would have been less rather than more invasive of a black defendant's interests and rights than is the lodging of such a power in a prosecutor, the defendant's often eager adversary -- sometimes, as here, on the issue of life and death.

Swain failed to give due weight to the fact that the venires from which trial juries are drawn may and very often do include black persons only in smaller proportion than their proportion in

the relevant population. Whatever may be thought of the constitutional rightness of this underrepresentation of black persons on the venire, its existence is a fact, a part, commonly, of the factual background against which the peremptory-challenge practice operates and takes effect. The outcome is a matter of simple arithmetic -- simple successive subtraction. If you can put many of the eligible black persons out of the running before the time to select the particular jury, and if the prosecutor has a generous number of "peremptory" challenges, then eliminating black persons altogether becomes not something which may be attainable but something certainly attainable. The constitutionality of an entire course of official conduct ought to be judged on the basis not of the self-serving characterizations the State assigns to its separate stages, but of its net effect, both potential and realized.

Indeed, even where the jury list is proportionally fair, the allowing of a good number of peremptory challenges to the prosecution will normally give the prosecutor a great advantage in his efforts to racialize the jury, because black persons are normally in a decided minority, so that it is feasible to challenge them all off. That is just what happened in this case. No corresponding privilege to counter-racialize the jury is given the black defendant, because there are too many white persons on the list.

A very important further point is that death-qualification, which results in elimination for cause preceding the peremptories, tends to eliminate proportionately more black persons than white persons. "The issue of capital punishment divides this country along racial lines as few others do these days." Harris Survey (Syndicated), February 7, 1977. The present record startlingly illustrates this; 17 of the 31 black persons voir dired were eliminated for scruples against the death

penalty, while only 3 of the 98 whites persons so examined were eliminated for the same cause.

For both the reasons just stated, in the nature of the case the elimination of racial "prejudice" -- or sympathy -- runs one way only. The net effect of the patterns exhibited by the typical cases is that it lies at last simply in the unreviewable discretion of the prosecutor whether to obtain an all-white jury to try a black defendant and to designate the punishment. Whatever reasoning brings one to that conclusion has to be wrong; where the overriding norm is that justice must not in fact be tainted with gross racism, the arrival at the conclusion that a prosecutor may in fact have and use this discretion, toward the goal and with the result of whitewashing the jury, is a mere reductio ad absurdum of the assumptions and characterizations on which such a conclusion is based.

The Swain opinion leaves not quite settled whether the Swain rule is an absolute rule of law or a rule, in some sense, of evidence. This can be tested by a simple question: If the prosecutor in this very case were to admit -- or even to proclaim, in connection, perhaps, with a campaign for reelection -- that his intent and purpose, in exercising peremptories, was to make sure the defendant had no black members on his jury, would trial and condemnation by the thus whitewashed jury have violated the Fourteenth Amendment? If Swain states a hard and fast rule of law, the answer would have to be "No." Officials may publicly congratulate themselves on their own lawful actions. But is that answer really possible, in this Court in the United States, in 1984? Can it be consistent with 18 U.S. Code §243, which seems on its face to make such a course of action a crime? See United States v. Pearson, 448 F.2d 1207, 1216 (5th Cir. 1971). (This is not altogether an imaginary hypothesis; in 1945, the Georgia Supreme Court found that for more than a

quarter of a century it had been the announced policy of the county solicitor of Bibb County, Georgia, to use his peremptories to get all black persons off all juries, and the Georgia Court upheld this practice in this 1945 appeal, Watkins v. State, 199 Ga. 81, 94, 33 S.E.2d 325, 334 (1945)[5]. This is the kind of background against which the issues in the present case ought to be perceived.

If, on the other hand, Swain simply sets up a rule as to burden and very high standard of proof, is it on long second thought so much as tenable that anything that can be called a standard of proof, however high, is not met by the facts in this case, at the very least for the purpose of shifting the burden of proof and persuasion to the prosecutor? This prosecutor used all ten of his peremptory challenges on ten black people. He then used his one alternate challenge to remove a black alternate. An all white jury was thus procured. Who would be willing to say that Mr. Justice Frankfurter's remark, in Avery v. Georgia, 345 U.S. 559, 564 (1953), is not applicable here:

> The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity.

To invoke the concepts of "statistics" and "probability" may be to bring up an elephant-gun to kill a fly, or at least a very sick elephant, when one is confronted with so obvious and gross a pattern of discrimination. Properly analyzed, all evidence of matters of fact rests on probability judgments, and most acceptable evidence rests on probabilities of much less force

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5. It appears that the Georgia Court reads Swain as validating the Watkins rule; Watkins is cited, with seeming total approval, in Hobbs v. State, 229 Ga. 556, 560, 192 S.E.2d 903, 907 (1972). Watkins must also be, at least in part, the authority for the Georgia Supreme Court's disposition of the case at bar: Hobbs is cited for precisely that reasoning it borrowed from Watkins.

than the one that grounds the inference that, in this very case, the prosecutor acted to racialize the jury.

Yet not only as to matters of principle but also as to the use of probability concepts in cases of racial discrimination, Swain is not easily, if at all, conformable to later holdings of this Court, and is flatly inconsistent with carefully considered statements in later opinions.

In Whitus v. Georgia, 385 U.S. 545 (1967) the Court reaffirmed that:

> For over fourscore years it has been the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment,t hat a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race.

385 U.S. at 549-50 (emphasis added). The Court in Whitus did not express an exception for those instances where such exclusion results from the use of peremptory challenges. Indeed, in that case the Court found a sufficient showing of racial discrimination, not only from the composition of the venire, but also from the fact that from a venire of 90 persons of which at least seven were black persons, "no Negro was accepted on the petit jury" by the prosecutor. Id. at 550. To the extent that Swain may be said to have isolated from inquiry the discriminatory use of peremptory challenges to choose the petit jury, it must be considered to be greatly weakened by Whitus.

Alexander v. Louisiana, 405 U.S. 625 (1972), also decided subsequent to Swain v. Alabama, concerned the discriminatory makeup of a grand jury. There the Court found a violation of equal protection based on the data from the individual case, noting:

> There has been a consistent process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury at each stage of the selection process until ultimately an all-white grand jury was selected to indict [this defendant]. 405 U.S. at 629 (emphasis added).

In Alexander the Court was concerned that the final process of choosing the actual panel from the collection of venire be free from discriminatory influences. The use of peremptory challenges is the most significant part of this final process and is that part most readily subject to abuse.

Other of this Court's decisions since Swain apply the statistical approach. Each case involved demonstration that the grand jury which indicted the defendant had such a disproportionately low number of black members that mere chance was an improbable explanation.

In Whitus v. Georgia, supra, the Court stated:

> [I]t is interesting to note the 'probability' involved in the situation before the Court. Assuming that 27% of the list was made up of the names of qualified Negroes, the mathematical probability of having seven Negroes on a venire of 90 is .000006. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv L. Rev. 338 (1966).

385 U.S. at 552 n.2 (emphasis added).

Virtual carbon copies of Whitus and relying thereon, Jones v. Georgia, 389 U.S. 24 (1967) and Sims v. Georgia, 389 U.S. 404 (1967) reached the identical result on similar statistical data.

In 1972, this Court again unanimously reaffirmed the validity of a statistical probability approach to proof of a prima facie case of purposeful discrimination in jury selection, by reference solely to the data regarding the jury which indicted the defendant. Mr. Justice White, writing for the Court in Alexander v. Louisiana, supra explained the difference from earlier cases in the nature and method of the proof offered to show purposeful discrimination.

> This is not a case where it is claimed that there have been no Negroes called for service within the last 30 years (citation omitted), only one Negro chosen within the last 40 years (citation omitted), or no Negroes selected 'within the memory of witnesses who had lived [in the area] all their lives' (citation omitted). Rather, petitioner argues that, in his case, there has been a consistent process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury at each stage of the selection process until ultimately an all-white grand jury was selected to indict him. [A 21% Negro population contrasted with a pool of possible grand jurors 14% Negro, culled to a list of 400 prospective grand jurors of whom 27 or 7% were Negro, 1 out of 20 on defendant's grand jury venire or 5% Negro, and no Negroes on defendant's 12 man grand jury.] [T]he substantial disparity raises a strong inference that racial discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would, at each stage, have so consistently reduced the number of Negroes. (Footnote: 'We take note, as we did in Whitus v. Georgia, [supra], of petitioner's demonstration that under one statistical technique of calculating probability, the chances that 27 Negroes would have been selected at random for the 400 member final jury list, when 1,015 out of the 7,374 questionaires returned were from Negroes, are one in 20,000.

Alexander v. Louisiana, 405 U.S. 625, 629-30 n.9 (emphasis added).

This Court, then, has increasingly accepted the use of a statistical approach, and it is submitted that the Court ought no longer to follow, as to the one matter of peremptories, that out-dated approach which requires a defendant to show systematic discriminatory use of a state's peremptory challenges over a long period in the past in order to make a prima facie showing of discrimination.

Aside from the fact that showing of such past pattern has proven (as was expectable) proverbially difficult for the single defendant, see, e.g., Ann. 79 A.L.R.3d 14, 22, Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class or

Race (1977), the rule has the grave substantial flaw that there is built into it the allowance of some number of convictions by deliberately racialized juries, and even of executions consequent on these, before relief is even theoretically to be had. There should be no room for free bites in such a matter as this.

Swain failed to take adequately into account the fact that the prosecutor's best reason and motive for challenging black persons off the jury -- the apprehension that black persons may be more sympathetic than white persons to a black defendant -- is precisely the very same as the reason for insistence that racializing of the jury is a grave constitutional wrong -- the apprehension, namely that white persons will be less sympathetic to a black defendant than will members of his own race. Everything in the history of racism in the United States -- especially but not entirely in the South -- confirms the realism of this latter fear, which is the exact logical equivalent of the prosecutor's reason for wanting to purge black jurors. A choice must of force be made between the prosecutor's desire for a jury less sympathetic toward the black defendant than would be a jury that included members of his race, and the defendant's exactly symmetrical and exactly contrary constitutional interest.[6] The case is not one in which some collateral prosecutorial motivation accidentally tends toward a result unfortunate from the defendant's point of view. The case is rather one where the

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6. Of course Henry Willis is also injured by the procuring of a jury grossly failing to embody a "cross-section of the community," Peters v. Kiff, 407 U.S. 493 (1972), and this injury is exacerbated by the use at that time of the Georgia provision exempting certain women from jury service. It is also true that the black community as a whole is stigmatized by its being treated as unfit to participate in the administration of justice. Strauder v. West Virginia, supra. But the dominant aspect of our own case is the raw anti-black racism exhibited by the procuring of an all-white jury to try a black person for his life.

prosecutor's position virtually forces him into seeking a jury less favorably -- which is to say, more unfavorably -- disposed toward the black defendant than would be a jury containing black members. The least the Fourteenth Amendment should be taken to command is that prosecutorial action in fact eventuating, as here, in the racializing of a jury, be held deeply suspect, and constitutionally wrongful in the absence of some special and very clearly proven circumstances -- if, indeed, such circumstances could ever be.

It might well be -- though it is not entirely clear why -- that such a rule would decrease the general utility of the prosecutorial statutory peremptory challenge. What has to be faced is that the Swain rule decreases -- to the point of extinction, in the many cases such as the present -- the defendant's constitutional right to an unracialized jury. There is no problem about the validity of the latter right; it came right out of the Fourteenth Amendment, in one of this Court's very first cases applying that Amendment. Strauder v. West Virginia, supra. The prosecutor's "right" to peremptory challenge, on the other hand, is not a constitutional right at all. It had no firm foothold anciently in this country; Van Dyke, Jury Selection Procedures (1977), says that Virginia and Massachusetts denied this "right" for most of the nineteenth century, and that in Kentucky and Maryland attempts to create this "right" were "beaten back at constitutional conventions." Far above all else, its theoretical foundation, its equity, is puzzlingly unclear. Blackstone based the defendant's right to peremptory challenge on its being in favorem vitae; within bounds, a defendant is to have some scope to find a jury not in his view predisposed to hang him. 4 Blackstone, Commentaries, 353. What is the correlative or corresponding ground for the prosecutor's peremptory challenge? The answer suggested by

But however that theoretical question may be answered for the general case, it is clear enough that -- against the background of "solid citizen" venires, chronically short on black persons, as well as death-qualification -- prosecutorial peremptory challenge, when used as the means of producing all-white juries in capital cases involving black defendants, operates, and at least constructively must be intended to operate, in favorem mortis.

This Court does not have to deal with a decision generally or predominantly acquiesced in by the profession, but with one that has quite failed of intellectual acceptance. [7] This cannot be irrelevant to the propriety of considering its overruling or modification. Cf. Erie RR. v. Tompkins 302 U.S. 671 (1938); Brown v. Board of Education, 369 U.S. 294 (1954).

Above all, as in so many other matters concerning sophisticated anti-black devices, the final question is whether one will accept and apply the words of Mr. Justice Blackmun: "The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene." Blackmun, J., dissenting, in Regents v. Bakke, 438 U.S. 265, 407 (1978).

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7. See, e.g., Brown, McGuire & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New Eng. L. Rev. 192, 196-202 (1978); Kuhn, Jury Discrimination: The Next Phase, 41 S. Claif. L. Rev. 235, 302 (1968); Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1, 10-11 (1982); The Supreme Court, 1964 Term, 79 Harv. L. Rev. 56, 135-39 (1965); Comment, The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 U. Cin. L. Rev. 554, 559-60 (1977); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1151, 1160-63 (1966); Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L. J. 1715, 1723 & n.36 (1977); Note, The Defendant's Right to Object to Prosecutorial Misuse of the Peremptoral Challenge, 92 Harv. L. Rev. 1717 (1979).

3. The Sixth Amendment

An issue not addressed by the Court in Swain v. Alabama, supra, was whether the prosecutor's use of peremptory challenges to exclude black persons from a defendant's trial jury denied the defendant the Sixth Amendment right to a jury composed of a representative cross section of the community. Swain was decided in 1965. In 1968, this Court held, for the first time, that the Sixth Amendment, as it relates to jury trials, applies to the states through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

Seven years later, in Taylor v. Louisiana, 419 U.S. 522, 526 (1975), the Court stated: "The background against which this case must be decided includes our holding in Duncan v. Louisiana [cite omitted] that the Sixth Amendment provision for jury trial is made binding on the States." * * * "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation." Id. at 530.

Thus, in Swain, the Court did not address a defendant's right not to have the State, through its official representatives, frustrate his right to a jury composed of a fair cross-section of the community.

The exclusion of black persons from jury service because of their race "contravenes the very idea of a jury -- a body truly representative of the community". Carter v. Jury Commission, 396 U.S. 320, 330 (1970). The actions of the prosecutor in Henry Willis' case deprived him of a jury "truly representative of the community" just as surely as if the county jury commissioners had systematically excluded all black persons from the venire lists.

4. Death Penalty Cases

In 1972, this Court found the then Georgia death penalty statute unconstitutional in Furman v. Georgia, 408 U.S. 288 (1972), essentially because the Court found that statute allowed the jury unbridled discretion in deciding whether to impose a life sentence or the death sentence on a defendant convicted of a capital offense. Post-Furman, the Court has recognized that a constitutional death penalty statute cannot limit the presentation of evidence of any aspect of the character and background of the defendant offered in mitigation of sentence. Lockett v. Ohio, 438 U.S. 586 (1978).

Whatever their merits, the statutes now approved by the Court, take the death-question jury quite beyond the sheer business of fact-finding, however loosely conceived, into areas of character-judgment, judgment of the repellency of the crime, judgment of all other factors that, in the eyes of the jury, make death not the mandated punishment but the suitable punishment in the individual case.

A most instructive case at this point, summarizing the current law, is Gardner v. Florida, 430 U.S. 349 (1977). The very question was whether a 1949 holding on one aspect of death-sentencing procedures could stand, but the reasonings of the Members of the Court are generalizable to all matters concerning the requisites of death-sentencing now.

For himself and two other Justices, Mr. Justice Stevens wrote:

> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state

> action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> 430 U.S. at 357-58.

Mr. Justice White, concurring, quoted a passage from Woodson v. North Carolina, 428 U.S. 280, 304-5 (1976):

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S. [86], 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence if imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.
>
> (emphasis added).

It is hard to think anything could be more agonizingly wrong, or more inconsonant with the quoted views, than purposively excluding black people from juries that are to direct the putting to death of black people. The individuated judgment, extending even to character, now envisioned and called for in capital cases, asks, above all, for understanding, whether of good or evil. What kind of a start is it toward that understanding to exclude from the tribunal all those who share with the defendant the characteristic of belonging to the black race, whose setting apart from the white race is the dominant theme in all the centuries of our national history? How could there be imagined a procedural and formative system more plainly calling for the application and effectuation, at all costs, of

the principle of Strauder v. West Virginia, supra, than does the death-choice system now validated by the Supreme Court?

The Georgia death statute, upheld by the Court in Gregg v. Georgia, 428 U.S. 153 (1976), perfectly illustrates this point. No Georgia jury in any case has to choose death as the punishment. A full and unlimited range of mitigating circumstances and characteristics may have force -- and under the holdings of the Court must have force. Lockett v. Ohio, supra. Can anybody be willing to say that juries purged to all-whiteness by peremptory challenge can and will perceive and give effect to this full range in respect of black defendants? Just as black jurors would? Prosecutors don't think so; the prosecutor in Henry Willis' case didn't think so.

A further point of the highest practical importance is that the death-qualification challenge for cause, given the prosecutor in death cases, makes easier in such cases the elimination of black persons. Proportionately more black persons than white persons oppose the death penalty. Harris Survey (syndicated) of February 7, 1977. The result is that normally, a good many members of this race can be eliminated on voir dire without using up peremptories, which are thus reserved for the final phase of racialization.

This point could not be made more plainly than it is by the record in the present case. Of the 31 black persons examined as prospective jurors, 17 were eliminated on the death-qualification. Of the 98 white persons examined, only 3 were eliminated on this basis, although, of course, all 98 were asked the death-qualification question. Thus, while more than half the black persons voir dired were eliminated by the death-qualification challenge, only about one in 33 whites was so disqualified.

Even if the prosecutor did not have the death-qualification challenge at his disposal to reduce the proportion of black persons on the panel, he could be fairly certain of securing an all-white jury in any county in which black persons constitute less than 23% of the 42 persons from among whom, under the Georgia statute, the jury will finally be struck.

In the present case, in Bleckley County, where 19% of the people are black, the prosecutor achieved precisely this result.

Race is an issue in many death penalty cases. This fact underlies and gives wide scope of application to the forthright doctrine of the Texas Court of Criminal Appeals (commendable for its candor if for nothing else) that "where the accused is black and the victim white it is not unreasonable that race becomes a trial-related consideration."[8] Ridley v. Texas, 475 S.W.2d 769 (Tex. Crim. App. 1972).

It must be emphasized, as directly and crucially relevant throughout the discussion, that the death penalty system, across the country, is now condemning black people to death in a proportion standing in a ratio of about four to one to their proportion of the national population.[9] This is a grim and terrible scandal. Every possible presumption should be in favor of eliminating any racist practice that may be contributing to

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8. Of course, the issue of race is much more than an abstract consideration in the case at bar. Henry Willis, a young black man, was tried for the murder of a white police officer in a rural south Georgia town. Even the most revisionist view of history could not blind us to the racial considerations involved.

Prior to Henry Willis' trial, six judges were disqualified for prejudice. One of these judges, Dunbar Harrison, testified at the hearing on the motion to disqualify that he did not believe that black persons were equal to white persons, did not believe in integrated schools, did not believe that black people truly desired education; he further testified that he would not socialize with black people and if his son dated a black woman he would throw both of them out of his house.

9. Death Row U.S.A., NAACP Legal Defense and Education Fund, March 1, 1984.

cause this disgraceful condition. Against the urgency of its correction, the convenience to the prosecutor of irresponsible freedom in peremptory challenge ought to weigh as nothing.

5. The Matter of Remedy

In a petition for certiorari, detailed exploration of questions of remedy would be premature, however, this issue is not new to the Court, and there have been dissents from denials of petitions for writs of certiorari indicating that the matter of remedy may be a problem to the Court. See Gilliard v. Mississippi, ____ U.S. ___, 78 L.Ed.2d 179 (1983).

The pervading general point has to be that what is to be remedied is not merely a possibly erroneous practice here and there, but a century long and pervading pattern of exclusion of black persons from jury service. The remedy ought to be of such sort as to redeem at last the promises that have stood unfulfilled through that century. There is now an urgency for a remedy.

Several considerations suggest that it is not likely, or even possible, that adequate remedies could not be devised.

First of all, and covering the whole ground, the most difficult imaginable case, as to remedy, would present itself if it were to appear, on full consideration, that no way could be found of accommodating both the prosecutorial power to challenge black people peremptorily, and the black defendant's right to an unracialized jury. But there could, even in such an event, be no hesitation as to the choice: prosecutors would have to be limited to challenging black people only for cause certain, at least in cases involving a black defendant and white victim, or at the very least in capital cases of that pattern. If one says that the deracialization of death juries, or of all juries, could

be attained only in this way, one has also said that this way must be followed; the interests in the two balance-pans are not even of the same order of magnitude, not fit to be mentioned in the same breath. The State that argues to this Court that the suppression of racism in jury selection cannot be accomplished without eliminating the peremptory challenging of black jurors should be held to have argued itself out of court.

The undoubted existence of massive past racial discrimination by public authorities in respect of jury selection is to be given great weight in the decision whether a thoroughgoing and really efficacious remedy, such as the one just mentioned, is appropriate. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1979). It ought also to be noticed that such a remedy involves no detriment to white persons; thus are avoided any feelings attending hard choices such as are posed in cases of the type of Regents v. Bakke, 438 U.S. 265 (1978), and United Steelworkers of America v. Weber, 443 U.S. 193 (1979), white persons would not even be subjected to such inconvenience as may occur in some busing decrees. Even the black communal interest in being relieved of the stigma of being excluded from certain types of jury service, see Strauder v. West Virginia, supra, would be attained, without any countervailing stigmatization of white persons, who under any remedial arrangement would necessarily serve in great numbers on juries of all sorts. The only cost of the remedy now under view would be the frustration of the prosecutor's desire for all-white juries -- if we can look on that as a cost.

Only some irrational clinging odor of the "normative power of the actual" could produce here a feeling of insuperable difficulty. There is no mystic overlaw of prosecutorial challenge to which even the Fourteenth Amendment must bow.

For this reason, several leading state courts have rejected the standard of proof put forward in Swain. See People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980). Cf. State v. Brown, 371 So.2d 751 (La. 1979).

In Wheeler, the California Supreme Court concluded that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross section of the community: under the California Constitution. 583 P.2d at 761-62. In Soares, the Massachusetts Supreme Judicial Court announced that the "exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group [,]" violated the jury trial guarantee of the Massachusetts Declaration of Rights, art. 12, 387 N.E.2d at 516. In Crespin, the Court of Appeals of New Mexico held, on the strength of the New Mexico Constitution, art. II, §14, that "improper, systematic exclusion by use of peremptory challenges" could be established either "under Swain . . . by presenting facts beyond the instant case," or "under the Wheeler-Soares rationale . . . where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor. " 612 P.2d at 718.

In fashioning an alternative standard of proof, the courts in Wheeler, Soares and Crespin all pursued a similar line of analysis. Each court began by embracing the Swain "presumption" that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. 380 U.S. at 223. However, each court then asserted that this "presumption" could be rebutted by a prima facie showing of discrimination. Three factors are required to establish a prima facie case of

discrimination. These factors include: 1) a reasonable record of the circumstances in controversy; 2) proof that the persons excluded shared membership in a protected, "cognizable group"; and 3) proof that exclusion stemmed from "group association" not "specific bias". Wheeler, 583 P.2d at 764.

Once a prima facie case is established, the burden of proof shifts to the opposing party, i.e., the prosecutor. He, in turn, must show that the disputed challenges were exercised "on grounds that were reasonably relevant to the trial or its parties or witnesses [,]", rather than on grounds of group bias or prejudice. Id. at 765. This showing need not rise to the level demanded of a challenge for cause. Id. at 765. If the court finds that the prosecutor has not sustained his burden of justification, the presumptive validity of the disputed challenges will stand rebutted. In such instances, the venire at issue will be quashed, and a new venire will be summoned.

Evidently, neither California nor Massachusetts courts have encountered any difficulty in applying the Wheeler-Soares procedure. See, e.g., People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982); People v. Fuller, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982); Commonwealth v. Allen, 400 N.E.2d 229 (Mass. App. 1980); Commonwealth v. Reid, 424 N.E.2d 495 (Mass. App. 1981). At least one justice of this Court has noted that the procedure appears to be "quite workable." McCray v. New York, 103 S.Ct. at 244 (Marshall, J., dissenting).

The apparent success of the Wheeler-Soares procedure demonstrates that courts may act to preserve the integrity of the peremptory challenge system without sacrificing the constitutional rights of accused persons. By striking a workable balance between these two competing interests, state courts have confirmed the importance and feasibility of modifying the rule in Swain. Cf. State v. Eaves, 365 So.2d 1361, 1364-73 (La. 1978)

(Dennis, J., concurring) (relying on state equal protection clause); Mallot v. State, 608 P.2d 737, 752 (Alaska 1980) (Rabinowitz, J., concurring and dissenting) (urging adoption of Wheeler-Soares procedure); Commonwealth v. Futch, 492 Pa. 359, 424 A.2d 1231, 1235 (1981) (Nix, J., concurring) (advocating adoption of Wheeler-Soares test); Andrews v. State, 438 So.2d 480, 480 (Fla. App. 1983) (Feguson, J., concurring) (urging adoption of Wheeler-Soares procedure).

The matter of remedy is not a problem.

CONCLUSION

The problem is the lack of desire by the State of Georgia to alleviate the advantages it has over black people by virtue of this discrimination. This Court cannot further nurture the ostrich approach to justice; there is not even a hint of experimentation or change in Georgia.

Henry Willis defies the State to enumerate one time in its 200 plus year history when it has been before this Court as litigant or amicus curiae seeking to eliminate the discrimination against black people in this or any other state, whether a voting rights, housing, employment or criminal justice case. This fact alone deserves weight in any hesitation to resolve this issue.

Henry Willis urgently prays the Court grant his writ of certiorari.

Respectfully submitted,

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APPLICABLE PROVISIONS OF THE CODE OF GEORGIA

- APPENDIX A -

Ga. Code Ann. §26-3102 [OCGA §17-10-31]

Capital offenses; jury verdict and sentence

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

(Acts 1968, pp. 1249, 1335; 1969, p. 809; 1973; pp. 159, 170.)

Ga. Code Ann. §59-805 [OCGA §15-12-165]

Peremptory challenges, number

Every person indicted for a crime or offense which may subject him to death or imprisonment in the penitentiary for not less than four years may peremptorily challenge twenty of the jurors impaneled to try him, and every person indicted for an offense which may subject him to imprisonment in the penitentiary for any time less than four years may peremptorily challenge twelve of the jurors impaneled to try him; and the State shall be allowed one-half the number of peremptory challenges allowed to the prisoner.

(Cobb, 835. Acts 1855-56, p. 231.)

Ga. Code Ann. §59-808 [OCGA §15-12-166]

When jurors sworn

If a juror shall be found competent and he shall not be challenged peremptorily by the State, he shall be put upon the prisoner, and unless challenged peremptorily by him, shall be sworn to try the case.

(Acts 1855-56, p. 231.)

Ga. Code Ann. §59-801 [OCGA §15-12-160]

Panel of jurors in felony trials; tales jurors

When any person shall stand indicted for a felony, the court shall have impaneled 42 jurors from which the defense and prosecution may strike jurors. If for any reason, after striking from the said panel, there remains less than 12 qualified jurors to try the case, the presiding judge shall summon such numbers of persons, who are competent jurors, as may be necessary to provide a full panel. In making up said panel, or successive panels, the presiding judge shall draw the tales jurors from the jury box of the county and order the sheriff to summon them.

(Acts 1855-56, p. 230; 1863, p. 141; 1871-72, p. 42; 1880-81, p. 120; 1889, p. 118; 1937, pp. 466, 468; 1973, pp. 286, 287.)

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 18th day of April, 1984.

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NO. 83-6608

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HENRY WILLIS, III,

Cross-Petitioner,

v.

WALTER D. ZANT, WARDEN,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE CROSS-RESPONDENT

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QUESTIONS PRESENTED

1.

Was the use of peremptory challenges by the district attorney constitutional in the instant case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT ON THE CROSS-PETITION.	
I. THE DISTRICT ATTORNEY'S USE OF PEREMPTORY CHALLENGES WAS CONSTITUTIONAL	2
CONCLUSION	4
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

Case cited:	Page(s)
Apodaca v. Orkin, 406 U.S. 404 (1972)	3
Ex parte Virginia, 100 U.S. 339 (1880)	4
Swain v. Alabama, 380 U.S. 202 (1965)	2,4
Willis v. Balkcom, 451 U.S. 926 (1981)	1
Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885 (1979)	1
Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) . .	2

NO. 83-6608

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HENRY WILLIS, III,

Cross-Petitioner,

v.

WALTER D. ZANT, WARDEN,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE CROSS-RESPONDENT

PART ONE

STATEMENT OF THE CASE

Cross-Petitioner, Henry Willis, III, was convicted of murder in January, 1978, in the Superior Court of Bleckley County, Georgia. Cross-Petitioner was sentenced to death after a trial by jury. The conviction and sentence were affirmed by the Supreme Court of Georgia on direct appeal and certiorari was denied by this Court. Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885 (1979).

A subsequent petition for a writ of habeas corpus was filed in the Superior Court of Tattnall County, Georgia. Said petition was denied on August 29, 1980. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on November 13, 1980. A subsequent petition for a writ of certiorari was denied by this Court. Willis v. Balkcom, 451 U.S. 926 (1981).

Cross-Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. On April 29, 1982, the magistrate entered a report and recommendation denying habeas corpus relief. The findings of fact and conclusions of law made by the magistrate were adopted by the district court on September 21, 1982.

Petitioner then appealed to the United States Court of Appeals for the Eleventh Circuit from the denial of habeas corpus relief. On November 17, 1983, A panel of that court entered an order directing that the district court conduct an evidentiary hearing on two specific issues. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). Cross-Respondent Zant filed a petition for rehearing and a suggestion for rehearing en banc challenging that decision. On December 20, 1983, rehearing was denied. Warden Zant then filed a petition for a writ of certiorari challenging the decision of the United States Court of Appeals for the Eleventh Circuit. Cross-Petitioner Willis filed a response in opposition to that petition and filed the instant cross-petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT ON THE CROSS-PETITION

I. THE DISTRICT ATTORNEY'S USE OF PEREMPTORY CHALLENGES WAS CONSTITUTIONAL.

Cross-Petitioner has urged this Court to grant a writ of certiorari to consider whether Swain v. Alabama, 380 U.S. 202 (1965) should be reversed and some stricter control on the use of peremptory challenges implemented. Cross-Respondent would urge this Court to deny the writ as requested by the Cross-Petitioner, but grant the writ on the issues presented by the initial petition.

As noted in the initial petition, this Court has long recognized that a criminal defendant is not constitutionally

entitled to have a person of his own race on the jury that tries him. Apodaca v. Orkin, 406 U.S. 404 (1972). Under Georgia law, all attorneys are entitled to exercise peremptory challenges at their own discretion. Cross-Petitioner has not challenged the constitutionality of that Georgia code provision. Thus, only by finding that code section unconstitutional may an inquiry be made into the thought processes behind a prosecutor's use of his peremptory challenges.

Cross-Respondent suggests that this Court should not grant the writ based on the position urged in the cross-petition. The prosecutor should continue to be presumed to act in a constitutional matter. Furthermore, an inquiry should not be made into an attorney's thought processes in attempting to obtain the best jury possible. If Cross-Petitioner's argument were adopted, then surely a defendant should also be precluded from excluding persons on the same basis. Cross-Respondent submits that the position asserted by the Cross-Petitioner amounts to an unreasonable intrusion into an attorney's decision making process and an attorney's tactical or strategic decisions. The courts have generally been reluctant to make such an inquiry into counsel's actions at trial. Cross-Respondent submits that this Court should also refrain from making such an inquiry under the circumstancs of the instant case. The mere fact that blacks may happen to be excluded from the jury panel is clearly insufficient to find any type of constitutional violation. This is particularly true in the instant case where the Cross-Respondent has noted in the original petition that there were obvious reasons for the excusal of these prospective jurors.

Cross-Respondent submits that the writ as suggested by the Cross-Petitioner should be denied as an undue intrusion into the use of peremptory challenges. This case is simply not one in which the prosecutor has announced an intent to obtain an all-white jury or announced that he intends to do so in every

case, unlike the examples set forth in the cross-petition. This is also not a situation such as that in Ex parte Virginia, 100 U.S. 339 (1880). In that case, a judge was specifically excluding blacks from even having the opportunity to serve on juries. In the instant case, blacks have the opportunity to serve on a jury. The prosecutor here simply utilized his peremptory strikes and it happened that all of the blacks were excluded. The fact that a prosecutor is a state official should not deprive the prosecutor of the opportunity to utilize his peremptory challenges in the manner he sees fit in order to obtain an impartial jury. Thus, contrary to the assertions of the Cross-Petitioner, this is not a case justifying the reversal of Swain v. Alabama, at least not on the basis asserted by the Cross-Petitioner.

Therefore, Cross-Respondent submits that the instant cross-petition should be denied as presenting no constitutional issue which would justify the Court granting Cross-Petitioner's application for the writ.

CONCLUSION

For all of the above and foregoing reasons, Cross-Respondent respectfully requests that this Court deny the cross-petition for a writ of certiorari filed on behalf of Henry Willis, III, but grant the initial petition for a writ of certiorari filed on behalf of Walter D. Zant.

Respectfully submitted,

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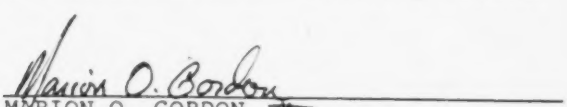

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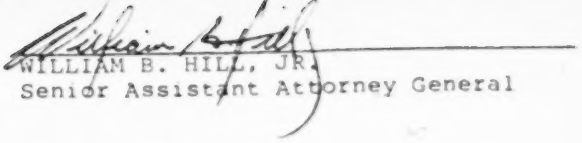

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Cross-Respondent upon the Cross-Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Joseph M. Nursey
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This 22nd day of May, 1984.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
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